

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2013 IL App (3d) 110535-U

Order filed November 5, 2013

---

IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the Circuit Court
	) of the 12th Judicial Circuit,
Plaintiff-Appellee,	) Will County, Illinois,
	)
v.	) Appeal No. 3-11-0535
	) Circuit No. 09-CF-2139
	)
SYLWESTER GAWLAK,	) Honorable
	) Robert P. Livas,
Defendant-Appellant.	) Judge, Presiding.

---

JUSTICE McDADE delivered the judgment of the court.  
Justice Schmidt concurred in the judgment.  
Justice Carter dissented.

---

**ORDER**

¶ 1 *Held:* The trial court's comments defining reasonable doubt violated defendant's rights to due process.

¶ 2 Defendant, Sylwester Gawlak, was convicted of unlawful violation of an order of protection (720 ILCS 5/12-30(a)(1) (West 2008)), and sentenced to four years in prison.

Defendant appeals, arguing that: (1) the trial court violated his right to a fair trial when it informed the jury that reasonable doubt was what they individually and collectively believed it to

be; (2) the trial court erred when it failed to conduct an analysis when addressing defendant's request for standby counsel; (3) defendant's four-year sentence was excessive; and (4) the \$200 deoxyribonucleic acid (DNA) analysis fee should be vacated. We reverse and remand for a new trial.

¶ 3

### FACTS

¶ 4 Defendant was charged with one count of unlawful violation of an order of protection (720 ILCS 5/12-30(a)(1) (West 2008)). The indictment alleged that defendant was subject to an order of protection prohibiting contact with his minor daughter, J.G. It further alleged that defendant had made contact with J.G. by mail, in violation of the order of protection.

¶ 5 Initially, defendant was represented by the public defender; however, before trial he advised the court that he wished to proceed *pro se*. At that time, defendant requested the appointment of standby counsel to assist him. The court denied defendant's request for standby counsel but allowed defendant to proceed *pro se*.

¶ 6 The cause proceeded to a jury trial. During jury selection, the trial court informed the 30 potential jurors that, if impaneled, they had to keep an open mind and listen to all of the evidence, arguments, and instructions before making a decision. The court then said:

"I absolutely will guarantee just by being alive, you undoubtedly all heard that the burden of proof in criminal trials is beyond a reasonable doubt. You have heard that probably a thousand times in the course of your life.

What you don't know is what the definition of beyond a reasonable doubt is. You ready? You will like this. Beyond a reasonable doubt means beyond a reasonable doubt. It's what each of you individually and then collectively believes beyond a reasonable

doubt is. No more. No less."

¶ 7 At trial, evidence established that defendant attempted to contact his daughter by mail, in violation of an order of protection. At the end of the trial, defendant was found guilty of the offense. The trial court sentenced defendant to an extended term of four years of imprisonment, to be served consecutively with a previous sentence for predatory criminal sexual assault of a child. Defendant appeals.

¶ 8 ANALYSIS

¶ 9 Defendant first argues that his due process rights were violated when the trial court defined reasonable doubt to the jury as "what each of you individually and then collectively believes." Initially, we note that defendant failed to object to the trial court's comments when they were made or include them as error in a posttrial motion. Therefore, the issue was forfeited and cannot be considered on appeal unless it was plain error. Ill. S. Ct. R. 615(a). The plain error doctrine bypasses forfeiture principles and allows a reviewing court to consider unpreserved error when: (1) the evidence is close, regardless of the seriousness of the error; or (2) the error is serious, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167 (2005). Our supreme court has equated the second prong of the plain error test with structural error. *People v. Thompson*, 238 Ill. 2d 598 (2010). Before we can determine whether the plain error rule applies, we must first determine whether an error actually occurred. *People v. Cosby*, 231 Ill. 2d 262 (2008).

¶ 10 In Illinois, the law is clear that neither the court nor counsel should attempt to define the reasonable doubt standard for the jury. See *People v. Franklin*, 2012 IL App (3d) 100618. In *Franklin*, this court addressed a similar statement made by the same trial court judge during jury

selection. In that case, the judge defined reasonable doubt as "what each of you individually and collectively, as 12 of you, believe is beyond a reasonable doubt." *Id.* ¶ 27. This court found error, reasoning that "by telling jurors that it was for them to collectively determine what reasonable doubt meant, there is a reasonable likelihood that the jurors understood the instruction to allow a conviction based on proof less than a reasonable doubt." *Id.* ¶ 28. The statement at issue in this case is nearly identical to the one in *Franklin*. Because we believe that *Franklin* was rightly decided, we too find error.

¶ 11 Having found error, we must now determine whether plain error occurred. In *Franklin*, this court noted that our supreme court has repeatedly identified a defective reasonable doubt instruction as structural error, as outlined in the second prong of the plain error test. *Franklin*, 2012 IL App (3d) 100618. The *Franklin* court concluded that the statement at issue was plain error. Following *Franklin*, we also find that the error was structural, and therefore it requires reversal. See *id.* Thus, we reverse and remand for a new trial.

¶ 12 Because we reverse on this issue, we find defendant's remaining issues moot.

¶ 13 CONCLUSION

¶ 14 The judgment of the circuit court of Will County is reversed, and the cause is remanded for a new trial.

¶ 15 Reversed and remanded.

¶ 16 JUSTICE CARTER, dissenting.

¶ 17 I respectfully dissent from the majority's order in the present case. For the same reasons that I discussed in my concurrence and dissent in *Franklin*, I would find that the trial court's reasonable doubt instruction in the instant case was not erroneous. See *Franklin*, 2012 IL App

(3d) 100618, ¶¶ 47-49, 51 (Carter, J., concurring in part and dissenting in part). Therefore, I would affirm defendant's conviction. I take no position on the other issues raised by defendant in this appeal since those issues have not been addressed in the majority's order.